No. 45236-7-II

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

DIVISION TWO

STATE OF WASHINGTON,

Respondent,

v.

SYLVESTER TUGGLES,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR THURSTON COUNTY

The Honorable Gary R. Tabor, Judge
Cause No. 12-1-00737-7

BRIEF OF RESPONDENT

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A. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Whether sidebars during trial held out of the hearing of anyone but the judge and the attorneys violates a defendant's right to a public trial under the Sixth Amendment or article 1, § 22, of the Washington Constitution.

2. Whether sidebars during trial held out of the hearing of anyone but the judge and the attorneys violates a defendant's right to be present guaranteed by article 1, § 22, of the Washington Constitution.

B. STATEMENT OF THE CASE.

The State accepts Tuggles' statement of the substantive and procedural facts of the case.

C. ARGUMENT.

1. Tuggles' right to a public trial was not violated by sidebars. The courtroom was never closed, and even if it had been, sidebars are not proceedings historically open to the public, nor would public access further the goals of an open courtroom.

Tuggles argues that his right to a public trial under both the Washington Constitution article 1, § 22, and the Sixth Amendment to the United States Constitution, was violated when the court held several sidebars during which only the prosecutor, the defense attorney, and the judge could hear what was said. Tuggles did not

object to any of the sidebars, and in fact the defense requested several of them. RP 47, 92, 117, 170, 221.[1]

A defendant may raise a public trial claim under article 1, § 22 for the first time on appeal. If the right to a public trial has been violated, prejudice will be presumed. In re Pers. Restraint of Ticeson, 159 Wn. App. 374, 382, 246 P.3d 550 (2011). "Whether the right to a public trial has been violated is a question of law reviewed de novo. State v. Lormor, 172 Wn.2d 85, 90, 257 P.3d 624 (2011). Both the Sixth Amendment to the United States Constitution and article 1, § 22 of the Washington Constitution guarantee a criminal defendant a public trial. Id. at 90-91. The initial question is whether the challenged proceeding even implicates the public trial right. State v. Sublett, 176 Wn.2d 58, 71, 292 P.3d 715 (2012)

The right to a public trial is not absolute, but the courtroom may be closed only for the most unusual of circumstances. State v. Heath, 150 Wn. App. 121, 715, 206 P.3d 712 (2009). The right to open proceedings extends to jury selection and some pretrial motions, and a trial court must, before closing the courtroom,

[1] All references to the Verbatim Report of Proceedings are to the two-volume trial transcript dated August 5, 6, and 15, 2013.

conduct the analysis required by State v. Bone-Club, 128 Wn.2d 254, 906 P.2d 325 (1995).

In Bone-Club, the court closed the courtroom during a pretrial suppression hearing, on the State's motion, because an undercover police officer was testifying and he feared public testimony would compromise his work. The Supreme Court found that this temporary, full closure of the courtroom had not been justified because the trial court failed to weigh the competing interests using a five-factor test derived from a series of prior cases, including Seattle Times v. Ishikawa, 97 Wn.2d 30, 640 P.2d 716 (1982). Those factors are:

> 1. The proponent of closure or sealing must make some showing [of a compelling interest], and where that need is based on a right other than an accused's right to a fair trial, the proponent must show a "serious and imminent threat" to that right.
>
> 2. Anyone present when the closure motion is made must be given an opportunity to object to the closure.
>
> 3. The proposed method for curtailing open access must be the least restrictive means available for protecting the threatened interests,
>
> 4. The court must weigh the competing interests of the proponent of the closure and the public.
>
> 5. The order must be no broader in its application or duration than necessary for the purpose.

Bone-Club, 128 Wn.2d. at 258-59.

That analysis is not required unless the public is "fully excluded from the proceedings within a courtroom," Lormor, 172 Wn.2d at 92 (citing to Bone-Club), 128 Wn.2d at 257, or when jurors are questioned in chambers. Id, (citing to State v. Momah, 167 Wn.2d 140, 146, 217 P.3d 321 (2009) and State v. Strode, 167 Wn.2d 222, 224, 217 P.3d 310 (2009)). The court then went on to define a closure:

> [A] "closure" occurs when the courtroom is completely and purposefully closed to spectators so that no one may enter and no one may leave.

Lormor, 172 Wn.2d. at 93.

Tuggles' argument presumes that the sidebars constituted a closure of the courtroom, but under this definition, the courtroom was never closed and there was no requirement for a Bone-Club analysis; the court did not err.

Not every interaction between the court, counsel, and defendants will implicate the right to a public trial, or constitute a closure, even if the public is excluded. Sublett, 176 Wn.2d at 71. To decide whether a particular process must be open to the general public, the Sublett court adopted the "experience and logic" test formulated by the United States Supreme Court in Press-Enterprise

Co. v. Superior Court, 478 U.S. 1, 8, 106 S. Ct. 2735, 92 L. Ed. 2d 1 (1986). The "experience" prong requires the court to determine if "'the place and process have historically been open to the press and public.'" Sublett, 176 Wn.2d at 73 (quoting Press-Enterprise, 478 U.S. at 8). The "logic" prong addresses "'whether public access plays a significant positive role in the functioning of the particular process in question.'" Id. If both questions are answered in the affirmative, the public trial right attaches and the trial court must consider the Bone-Club factors before closing the proceeding to the public. Id.

The experience and logic test was formulated to determine whether the core values of the right to a public trial are implicated. Sublett, 176 Wn.2d at 73. The right to a public trial exists to "ensure a fair trial, to remind the officers of the court of the importance of their functions, to encourage witnesses to come forward, and to discourage perjury." State v. Brightman, 155 Wn.2d 506, 514, 122 P.3d 150 (2005) (citing to federal cases). The harms associated with a closed trial have been identified as:

> [T]he inability of the public to judge for itself and to reinforce by its presence the fairness of the process, ... the inability of the defendant's family to contribute their knowledge or insight to the jury selection, and

> the inability of the venirepersons to see the interested individuals.

In re Pers. Restraint of Orange, 152 Wn.2d 795, 812, 100 P.3d 291 (2004).

Applying that test, the Sublett court held that no violation of the right to a public trial occurred when the court considered a jury question in chambers.

There is no dispute that the sidebars at issue in this trial occurred in the courtroom and the courtroom was open. Tuggles offers no authority, nor can the State find any, to show that sidebars have not historically been conducted out of the hearing of the jurors and spectators. That is the whole purpose of the sidebar—so that the jury does not hear the discussion. The alternative would be to excuse the jury each time some issue needed to be addressed outside of its presence.

> In the case of sidebar discussions, issues arising with the jury present would always require interrupting trial to send the jury to the jury room, often located some distance from the courtroom, thereby occasioning long delays every time the court wishes to caution counsel or hear more than a simple "objection, Your Honor." This would do nothing to make the trial more fair, to foster public trust, or to serve as a check on judges by way of public scrutiny.

Ticeson, 159 Wn.2d at 386, n. 38. Sidebars do not violate any of the core values of the public trial right.

In State v. Love, 176 Wn. App. 911, 309 P.3d 1209 (2013), the Court of Appeals assumed, without deciding, that a sidebar conference constituted a closure. Id. at 917. In that case, challenges for cause to the jury venire had been held at a sidebar. Id. at 915. Applying the Sublett experience and logic test, the court concluded that it was not error to handle challenges at a sidebar. Despite its earlier assumption, the court held that "[t]he sidebar conference did not close the courtroom." Id. at 920.

The court in Love further explained that the written record of the challenges to potential jurors satisfied the public interest in monitoring the integrity of trials. Love, 176 Wn. App. at 919-20. In Tuggles' case, either a specific record was made of the content of the sidebar or it is clear from the context. In his opening brief, Tuggles has done a thorough job of describing each sidebar. Appellant's Opening Brief at 4-8. The first, at RP 47-48, was memorialized at the next recess. RP 65. The second, at RP 63, was apparently a request by defense attorney for a recess. RP 63. The third, at RP 82, was for the purpose of formatting a recording so that only parts would be played to the jury. RP 83. The fourth,

at RP 92, was obviously for the purpose of the defense making an objection, which was overruled. RP 92. The fifth, at RP 107, was memorialized at RP 110. The sixth, at RP 117, is again obvious from the context; the defense made an objection and the court made a ruling. RP 117-18. The seventh, at RP 169-70, was again obviously for the purpose of hearing and ruling on a defense objection. RP 170. The last sidebar, at RP 221, was memorialized at RP 240-241—defense counsel was feeling ill and asked for a brief recess. There is a sufficient record here to alleviate any concerns about the integrity of the trial.

A sidebar is not a closure of the courtroom. Because it is not a closure, there is no requirement for the court to conduct a Bone-Club analysis.

2. Tuggles was present in the courtroom during the sidebars. There was no violation of his right to be present at all critical stages of the proceedings.

Tuggles argues that his right "to appear and defend In person" under Washington Constitution article 1, § 22, was violated by the sidebars. The record is silent as to Tuggles' location in the courtroom, but his argument presumes that it was somewhere other than at the bench where the sidebars took place. He does not claim, however, that he was excluded from the courtroom.

As noted above, Tuggles did not object in the trial court to any of the sidebars. Generally, a reviewing court will not hear claims not raised below unless the issue is one of "manifest error affecting a constitutional right." RAP 2.5(a)(3). In that event, the claim may be raised if there is a sufficient record upon which the reviewing court can make a determination. Love, 176 Wn. App. at 921. An error is manifest if it actually prejudiced the defendant. Here Tuggles has not shown prejudice, nor has he claimed any; he appears to presume prejudice. However, like Love, Tuggles was present in the courtroom and there is nothing in the record to indicate he did not have the opportunity to ask his counsel whatever questions or offer whatever input he wished. Love, 176 Wn. App. at 921. Because he does not show manifest error, this court should decline to address his claim.

Even if the court does address the merits of Tuggles' argument, there is no error.

A defendant has a constitutional right to be present at all critical stages of the proceedings. A critical stage occurs when evidence is being presented or whenever the defendant's presence has "a relation, reasonably substantial," to the opportunity to defend against the charge. In re Pers. Restraint of Lord, 123 Wn.2d 296,

306, 868 P.2d 835 (1994) (quoting United States v. Gagnon, 470 U.S. 522, 526, 105 S. Ct. 1482, 84 l. Ed. 2d 486(1985)). Citing to federal authorities, the court held that Lord did not have the right to be present at numerous conferences between counsel and the judge.

> The core of the constitutional right to be present is the right to be present when evidence is being presented. . . . Beyond that, the defendant has a "right to be present at a proceeding 'whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge . . .'" . . . The defendant therefore does not have a right to be present during in-chambers or bench conferences between the court and counsel on legal matters, . . . at least where those matters do not require a resolution of disputed facts.

Id., internal cites omitted. Tuggles cites to Lord, as well as State v. Bremer, 98 Wn. App. 832, 991 P.2d 118 (2000), for constitutional principles regarding the right to be present. Appellant's Opening Brief at 16-18. Neither case, however, specifically addresses the Washington constitution, but both cite to federal cases which, of course, interpret the United States Constitution. Tuggles does not offer any argument that the Washington Constitution is more protective than the federal.

Nothing in the record gives any indication that factual matters were discussed at any of the sidebars. All of them were

either dealing with defense objections, which are legal decisions, or with matters of scheduling and logistics. See the itemization above at pages 7 and 8. The sidebars made no impact on his ability to defend against the charges.

Finally, Tuggles does not identify exactly what he means by "present." As noted, there is nothing on the record to indicate that he was at any time excluded from the courtroom, and he does not allege that he was. He offers no argument, nor does the record indicate, that he was in any way prevented from consulting with his attorney as he wished, asking about the content of the sidebars, and offering his input as he saw fit. It strains the notion of "presence" to conclude that he was not present. The fact that he did not have his head in the huddle at the bench does not mean he was not present.

A violation of a criminal defendant's right to be present is subject to harmless error analysis. *See* United States v. Marks, 530 F.3d 799 (9th Cir. 2008); Rice v. Wood, 77 F.3d 1138 (9th Cir. 1996). An error will be deemed harmless unless it has a "substantial and injurious effect or influence in determining the jury's verdict." Rice, 77 F.3d at 1144 (internal quotation marks omitted). Tuggles offers no argument that the verdict was in any

way influenced by the fact that he was not standing at the bench during the sidebars. Even if this court were to find error, it was harmless.

D. CONCLUSION.

There was no violation of Tuggles' rights to a public trial or to be present at all critical stages of the proceedings. The State respectfully asks this court to affirm his convictions.

Respectfully submitted this 1st day of May, 2014.

Carol La Verne, WSBA# 19229
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CERTIFICATE OF SERVICE

I certify that I served a copy of the Brief of Respondent on the date below as follows:

Electronically filed at Division II

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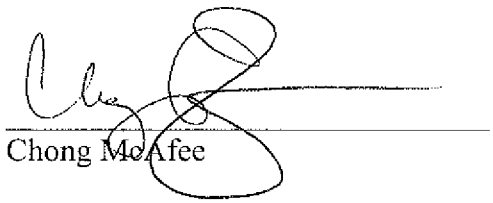
I certify under penalty of perjury under laws of the State of Washington that the foregoing is true and correct.

Dated this 1st day of May, 2014, at Olympia, Washington.



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